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February 9, 1995

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

EX PARTE

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

RE: PR Docket No. 94-105; Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates

Dear Mr. Caton:

On Thursday, February 9, 1995, Brian Kidney, Margaret Gill and I, on behalf of AirTouch Communications, met with Ruth Milkman, Senior Advisor to Chairman Hundt. We provided the attached information. Please associate this material with the above-referenced proceeding.

Two copies of this notice are being submitted to the Secretary in accordance with Section 1.1206(a)(1) of the Commission's Rules.

Please stamp and return the provided copy to confirm your receipt. Please contact me at 202-293-4955 should you have any questions or require additional information concerning this matter.

Sincerely,

Kathleen Q. Abernathy

Attachment

cc: Ruth Milkman

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List ABCDE

FCC Jurisdiction Over Cellular Rates

AirTouch Communications
February 9, 1995

STATES' BURDEN OF PROOF

- Congress decided to "replace[ ] traditional regulation of mobile services with an approach that brings all mobile service providers under a comprehensive, consistent regulatory framework and gives the Commission flexibility to establish appropriate levels of regulation for mobile radio service providers." Second Report and Order at 1417.

- "To foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure, new section 332(c)(3)(A) also would preempt state rate and entry regulation of all commercial mobile services." H.R. No. 103-111 at 587.

- Congress permitted only limited exceptions to its universal preemption of state regulation of rates and entry. "States may petition the FCC for authority to regulate the rates for commercial mobile services under specified circumstances." H.R. No. 103-111 at 587. A state may continue existing regulation or impose new regulation of CMRS service only where the state can prove that the "market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory." Section 332(c)(3)(A).

STATES' BURDEN OF PROOF

- The legislative history of the Budget Reconciliation Act provides that:

  "Section 332 (c)(3)(b) permits states to petition the Commission for authority to regulate rates for any commercial mobile services where mobile services have become a substitute for telephone service, or where market conditions are such that consumers are not protected from unreasonable and unjust rates. [sic] In assessing, under clause (ii), whether market conditions in a state fail to protect subscribers of commercial mobile services adequately, the FCC shall take into account such factors as the number of such subscribers in proportion to the total population of a service area; and the number of market entrants providing such services. In reviewing petitions under clause (ii), the Commission also should be mindful of the Committee's desire to give the policies embodied in Section 332(c) an adequate opportunity to yield the benefits of increased competition and subscriber choice anticipated by the Committee." (emphasis added) H.R. No. 103-111 at 588.

- The Commission has found that "[s]tates must, consistent with the statute, clear substantial hurdles if they seek to continue or initiate rate regulation of CMRS providers." Second Report and Order at 1421 (emphasis added). See Sections 20.13 (a)(5) and (b)(1) of the Commission's Rules. The Commission has noted that "competition is a strong protector of [the interests of telecommunications users] and that state regulation in this context could inadvertently become as [sic] a burden to the development of this competition. Our preemption rules will help promote investment in the wireless infrastructure by preventing burdensome and unnecessary state regulatory practices that impede our federal mandate for regulatory parity." (emphasis added) Second Report and Order at 1421.

STATES' BURDEN OF PROOF

- The Commission has stated that "... in striving to adopt an appropriate level of regulation for CMRS providers, we establish, as a principal objective the goal of ensuring that unwarranted regulatory burdens are not imposed upon any mobile radio licensees who are classified as CMRS providers ... we have vigorously implemented the preemption provisions of the Budget Act to ensure that state rate regulation of CMRS providers will be established only in the case of demonstrated market conditions in which competitive forces are not adequately protecting the interests of CMRS subscribers." Second Report and Order at 1418, 1419 (emphasis added).

- NARUC has acknowledged that states seeking to continue rate regulation face a "stiff" burden of proof. "Petition for Reconsideration and Clarification of the National Association for Regulatory Utility Commissions, "Gen. Docket No. 93-252, filed May 19, 1994, at 3.

RESTRICTIONS ON REGULATION PENDING RESOLUTION OF THE CPUC PETITION

- States that had "in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service" may petition for authority "to continue exercising authority over such rates" (emphasis added) under Section 332(c)(3)(B).

- A state that files a petition under subsection (B) is granted limited authority to continue its "existing regulation" that had been in effect as of June 1, 1993 until this Commission acts on the state's petition. Section 323(c)(3)(B).

- The most important components of the regulatory scheme the CPUC seeks to impose--including the requirement that cellular carriers unbundle their wholesale rates and that they interconnect to a reseller switch--are not part of California's "existing regulation." Those requirements were imposed upon the cellular carriers in a CPUC decision adopted on August 3, 1994. The CPUC's attempt to use the mechanism of a petition under Section 332(c)(3)(B) to evade preemption of its newly-imposed regulations is plainly invalid.

- In imposing these new regulations, the CPUC contended that Section 332(c)(3)(B) broadly preserves its "authority to regulate," rather than its "specific rules in effect" as of the statutory cut-off date [See CPUC Petition.] This construction cannot be squared with the actual statutory language. The statute does not refer to a state's "regulatory authority," but rather only to the state's "existing regulation" in effect as of June 1, 1993. The CPUC's interpretation reads the words "existing regulation" out of the statute.

STATES' BURDEN OF PROOF

- Congress and this Commission established state preemption of rates and entry for cellular as the norm.

- If preemption is the norm, then a state must prove that conditions in that state are sufficiently different from the norm to warrent state regulatory intervention.

- The Commission should expect states to demonstrate:

  - That competition among CMRS operators is less active than in the rest of the U.S.

  - That conditions in the state will stifle competition from new entrants.

  - That the state has been so successful in regulating cellular rates that they are among the <u>lowest</u> in the nation.

States should not be rewarded with extended regulatory authority unless thy can prove that their prior regulation has resulted in conditions measurably better than the norm.